

Service Date: May 21, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Application of)	UTILITY DIVISION
U S WEST Communications, Inc. Pursuant)	
to Section 252(e) of the Telecommunications)	
Act of 1996 for Approval of its)	DOCKET NO. D97.7.135
Interconnection Agreement with Kevin)	
Kerr, dba Montana TEL-NET.)	ORDER NO. 6021b

ORDER ON FIRST AMENDMENT TO AGREEMENT

Introduction

1. U S WEST Communications, Inc. (U S WEST) entered into a negotiated interconnection agreement with Kevin Kerr, doing business as Montana TEL-NET (TEL-NET). U S WEST filed the parties' agreement, entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Kevin Kerr Doing Business As Montana TEL-NET" (Agreement), with the Montana Public Service Commission (Commission) for approval on July 31, 1997.
2. The Commission adopted a Final Order on October 27, 1997. The Final Order rejected some of the terms in the Agreement because they were not consistent with the public interest, convenience and necessity, discriminated against carriers who were not parties to the Agreement, or were inconsistent with Montana law. U S WEST filed a motion for reconsideration which the Commission granted on November 24, 1997. In Order No. 6021a, the Commission reversed its decisions in the Final Order, concluding that (1) U S WEST should be permitted to discuss its products and services with Tel-Net's customers who call for any reason, and (2) also permitting U S WEST to refuse to provide Tel-Net with the name of another reseller or service provider who succeeds in acquiring Tel-Net's end user customer.

3. In the order on reconsideration dated December 10, 1997, U S WEST and Tel-Net were ordered to file an amendment without delay evidencing the Commission's decisions in Order No. 6021 and Order No. 6021a. They did not file an amendment until March 27, 1998.

4. Upon review of the First Amendment, the Commission makes the following findings, conclusions and order.

Commission Decision

5. The parties amended their Agreement to delete Section XXIV.C at page 73 of the Agreement in its entirety. This section was rejected by the Commission and did not need to be addressed in the amendment. Nonetheless, it complies with Order No. 6021.

6. The parties amended Section XXVII.R to insert the underlined language in the following provision:

Dispute Resolution

If any claim, controversy or dispute between the parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The Parties shall notify the Commission of issues to be arbitrated. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof subject to review by the Commission. The Parties shall submit a copy of each arbitration opinion to the Commission. The arbitrator's decision shall remain in effect unless the Commission decides otherwise within forty-five days. Each Party shall bear its own costs and attorney's fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration shall occur in Helena, Montana. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission or the Federal Communications Commission as provided by state or federal law. . . .

The Commission has rejected similar provisions in numerous other amendments because it does not provide for notice to the Commission well in advance of the arbitration, amendments to the contract may not go into effect unless the Commission approves them and an

amendment may be necessary subsequent to the arbitrator's decision. We reiterate that the parties cannot sidestep the express law that governs their agreement, which is what the 45-day provision does. An arbitrated resolution reached by an arbitrator other than the Commission or its designee is not affected by the 30-day provision in § 252(e)(4) for arbitrated agreements. Accordingly, this section should be revised to comply with the law and to provide that an arbitrated decision shall not go into effect before the Commission reviews it. It may well be that some arbitrated resolutions should go into effect very soon upon resolution, but the Commission believes that such decisions can be accommodated by the Commission on an individual case basis.

7. The amendment also deletes Section IV.C.4(d) of the resale agreement in its entirety. Again, this is unnecessary as the Commission rejected the provision in Order No. 6021 and, therefore, it was stricken from the Agreement at that time.

8. The amendment also deletes a sentence in Section IV.E.1 of the resale agreement which was rejected in Order No. 6021 and stricken from the Agreement at that time.

9. The amendment corrects typographical errors in Section IV.E.1, although it still incorrectly references the error by stating that "Section IV.E.1 is further amended by (1) in the second paragraph correcting the docket reference from D96.11.200 (sic) to D96.11.200" The Agreement incorrectly referred to D93.11.2000 not D96.11.200. The amendment sufficiently handles the original error, however.

10. Another attempt to correct a typographical error in Section VII.A removes too many words and renders the sentence ungrammatical. We assume the parties intended to delete the phrase "shall be effective _____ and" instead of "shall be effective _____ and shall" and approve it as first stated. If this is not the case, the parties may ask for reconsideration.

11. Section VII.C.5 of the resale agreement adds a sentence to address the Commission's conclusion that the section did not provide for notice to the Commission prior to terminating service to the reseller. This amending provision has been addressed in several Commission orders and rejected. As in those dockets, the parties' redrafted provision does not address the concerns expressed in the Final Order and is rejected. The new provision adds a sentence to the existing section, which states, "USWC will not disconnect an end user customer without first

providing fourteen (14) days advance written notice to the Commission." We are concerned that the end user customers of Tel-Net be notified if U S WEST intends to cease provisioning to Tel-Net and we are concerned that Tel-Net's customers be permitted to make informed choices if Tel-Net can no longer provide service to them.

12. To address this concern, the Commission suggests that language be included to provide that U S WEST shall notify the Commission at the same time it notifies Tel-Net of a pending disconnection. The first sentence of Section 1.3 in the First Amendment could be revised to state that U S WEST "will notify Reseller and the Commission of such disconnection fourteen (14) days prior to the effective date of the disconnection." With this language, the Commission can ensure that the reseller's customers are notified and it can take action to notify the reseller's end user customers of options they have available to them, which could include an option to continue their service as a customer of U S WEST or to change to another competitive local exchange carrier.

13. As proposed, however, Tel-Net customers would essentially be "slammed" to U S WEST if U S WEST disconnected Tel-Net. Thus, if U S WEST continues to provide the service after it has disconnected a reseller, it may be in violation of § 69-3-1303, MCA, if it does not have the documentation required by that section. Accordingly, the Commission must reject Section 7 in the First Amendment.

14. Section 8 of the First Amendment includes typographical errors in the last sentence of the first full paragraph and the last sentence of the second paragraph. The parties should note that the last full sentence of the first paragraph should state the "Telecommunications Act of 1996" and the spelling of *Eighth Circuit* in the second paragraph is incorrect. Neither changes the meaning of the paragraph, however.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. TEL-NET is a telephone competitive local exchange carrier intending to provide regulated services in the State of Montana.



2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the First Amendment to the interconnection agreement of the parties is approved and rejected as discussed herein.

DONE AND DATED this 18th day of May, 1998, by a vote of 5-0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION